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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| DOCK MCNEELY,<br>Plaintiff and Appellant,<br>v.<br>STATE OF CALIFORNIA VICTIM COMPENSATION BOARD et al.,<br>Defendants and Respondents. | A152898<br><br>(Alameda County<br>Super. Ct. No. RG16843747) |

Dock McNeely, acting in propria persona, appeals from a judgment of dismissal after a demurrer on his petition for writ of mandate against State of California Victim Compensation Board and State of California Department of Justice (collectively, "State") was sustained without leave to amend. He contends his duty to register as a sex offender has ended due to litigation setting it aside, and he is therefore entitled to collect compensation from the State for time spent in prison notwithstanding Government Code section 13956, subdivision (c), which precludes an award of compensation while a person is required to register as a sex offender. We disagree and affirm.

## I. BACKGROUND[1]

Appellant was convicted of continuous sexual abuse of a child in Placer County Superior Court in 1995, pursuant to Penal Code section 288.5. He was placed on probation and required to register as a sex offender. In 1998, appellant was arrested in

[1] The procedural history is taken from the writ petition and the prior judicial opinions in this case, of which we take judicial notice. (Evid. Code §§, 452, 459.)

Sacramento County on sexual abuse charges and for failure to register as a sex offender. (*McNeely v. Blanas* (9th Cir. 2003) 336 F.3d 822, 824.) He was held in custody for five years without trial. (*Id.* at pp. 824–825.)[2] In 2003, responding to appellant's petition for habeas corpus, the Ninth Circuit concluded his Sixth Amendment right to a speedy trial had been violated in the 1998 case. (*McNeely v. Blanas*, *supra*, 336 F.3d at p. 832.)

Appellant was convicted of failing to register as a sex offender in 2009 and sentenced to an aggregate term of seven years and four months. (*McNeely v. Arenas* (Feb. 4, 2016, A144982) [nonpub. opn.].) He was released from prison on October 28, 2014. (*Ibid*.) During his incarceration, appellant filed five applications challenging his 1995 criminal conviction, which was the underlying reason he was required to register. (*McNeely v. McGuiness* (E.D. Cal. Feb. 6, 2008, No. CIV S-08-0175 LEW JFM P) 2008 WL 346058; *McNeely v. County of Sacramento* (E.D. Cal. Apr. 12, 2010, No. CIV S-09-2520 WBS GGH P) 2010 WL 1444626; *McNeely v. Swarthout* (E.D. Cal. Sept. 29, 2010, No. CIV-10-0728 JAM KJM P) 2010 WL 3853232; *McNeely v. Blanas* (E.D. Cal. Feb. 2, 2011, No. CIV S-00-1358 JAM EFB P) 2011 WL 380660; *McNeely v. Chappell* (E.D. Cal. Sept. 4, 2014, No. 2:12-cv-0931-EFB P) 2014 WL 4377954.) Federal courts determined his 1995 conviction remained valid and he had a continuing duty to register. (See *McNeely v. Chappell*, *supra*, 2014 WL 4377954.)

In 2012 and 2015, appellant filed victim compensation applications with the State alleging it owed him monetary compensation because the State had deprived him of personal liberty in the criminal proceedings. The 2012 claim was denied, as was a 2013

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[2] As noted in a prior opinion in this matter, "The case has been repeatedly continued due to a combination of competency hearings, replacements of counsel, a period from February 19, 1999, to August 19, 1999, when McNeely was found to be incompetent and committed to a state hospital, the disqualification of two judges, and numerous other continuances. The precise reasons for many of the continuances are unclear due to Respondent's failure to provide a complete and certified state court record, the cryptic notations which constitute much of the purported state court record, the absence of any key to the extensive abbreviations in the 'minutes,' the absence of transcripts for the vast majority of the various hearings, and the absence of any key for the period between December 31, 2000, and March 26, 2002." (*McNeely v. Blanas*, *supra*, 336 F.3d at p. 825.)

administrative appeal. The State also denied the 2015 claim, and denied appellant's administrative appeal of the same on June 26, 2015.

Appellant filed the instant writ of mandate on December 23, 2016. He alleged that the State must record a certificate of disposition indicating he is not required to register as a sex offender and must give him a hearing on compensation. The State filed a demurrer to the petition, arguing (1) appellant's claims were barred by the doctrine of collateral estoppel; (2) appellant did not exhaust his administrative remedies; and (3) the statute of limitations had run because the petition was filed more than one year after the more recent denial of the claim.

The trial court sustained the demurrer without leave to amend, granting the parties' requests for judicial notice of prior opinions and orders in the case. It found that the petition stated two claims: (1) a Code of Civil Procedure section 1085 petition against the California Department of Justice, arguing it was required to record a 2003 certificate of disposition and clarify that appellant was not required to register as a sex offender; and (2) a Code of Civil Procedure section 1094.5 petition against the California Victim Compensation Board alleging that it made errors in denying plaintiff's claims. It found that neither petition had merit because federal courts had repeatedly held that the 1995 conviction has never been ordered vacated, compensation may not be ordered for a sex offender while the registration requirement remains in place, and appellant had failed to exhaust his administrative remedies. The case was ordered dismissed and notice of entry of this dismissal was served September 18, 2017. This timely appeal follows.

## II. STANDARD OF REVIEW

Two standards are employed to review an order sustaining a demurrer without leave to amend. First, we review the complaint de novo to determine whether it alleged sufficient facts to state a cause of action, treating as true all material facts that have been properly pleaded (as well as matters subject to judicial notice), but disregarding contentions, deductions or conclusions of fact or law. (*Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 344 (*Heritage Oaks*); see *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.)

We then apply an abuse of discretion standard to determine whether there is a reasonable possibility the defects in the complaint could be cured by amendment. (*Heritage Oaks*, at p. 344.) Issues of res judicata or collateral estoppel may be resolved on demurrer when the pleadings and judicially noticed facts conclusively establish the elements of those doctrines. (See *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225.)

## III. DISCUSSION

Appellant's petition seeks a determination that he is not required to register as a sex offender and a hearing on his compensation claims. Government Code section 13956, subdivision (c)(1) provides in relevant part, "In no case shall compensation be granted to an applicant pursuant to this chapter during any period of time the applicant is held in a correctional institution, *or while an applicant is required to register as a sex offender pursuant to Section 290 of the Penal Code*." (Italics added.) Thus, if appellant is required to register as a sex offender, he is not entitled to the relief requested.

The pleadings allege that appellant is not required to register as a sex offender because the federal courts invalidated the 1995 conviction that requires him to register. The prior federal decisions addressing this issue, of which the trial court properly took judicial notice, show otherwise. Appellant's prosecution on the 1998 charges for failure to register were dismissed on speedy trial grounds, not because the underlying conviction for a sex offense was in any way invalid. (*McNeely v. Blanas*, *supra*, 336 F.3d at p. 824–825.) For example, in the final order issued in *McNeely v. Chappell*, *supra*, 2014 WL 4377954, at pp. *5–8, the court states:

"In the instant petition, petitioner claims, in essence, that his 2009 conviction for failing to register as a sex offender, based on his 1995 state court conviction for continuous sexual abuse of a child, is contrary to the decision of the Court of Appeals in *McNeely v. Blanas*, 336 F.3d 822 (9th Cir.2003) []. In *McNeely*, the Ninth Circuit granted habeas relief under 28 U.S.C. § 2241 and ordered dismissed charges against this same petitioner stemming from 1998 charges of lewd and lascivious conduct upon a child under the age of 14 and failing to register as a sex offender on the grounds that pretrial

delay of more than five years violated petitioner's right to a speedy trial. Petitioner is apparently contending that the decision in *McNeely* prevents the state, under principles of res judicata and collateral estoppel, from ever charging him with failing to register as a sex offender. . . .[¶] . . . .[¶]

"As set forth above, petitioner claims that his conviction and sentence are somehow precluded by the decision of the Court of Appeals for the Ninth Circuit in *McNeely v. Blanas*, 336 F.3d 822 (9th Cir.2003). This is not the first time petitioner has pressed the argument. Petitioner unsuccessfully raised this same claim in several habeas petitions filed in this court. In one such habeas petition, the assigned magistrate judge explained the interplay between petitioner's 1995 conviction, upon which petitioner's current charges for failing to register as a sex offender are based, and the charges at issue in *McNeely*, as follows:

" 'The instant petition should be dismissed because there is no factual basis for petitioner's claims. As noted above, petitioner contends that the state arrested and confined him for failing to register as a sex offender based on his 1995 Placer County conviction. Petitioner asserts that the Ninth Circuit invalidated his 1995 conviction in its 2003 decision in *McNeely v. Blanas*. Petitioner, however, is mistaken. . . . [¶]

" 'In its opinion, the Ninth Circuit did not address, let alone invalidate, petitioner's underlying 1995 Placer County conviction. Nor did the Ninth Circuit suggest in any way that the state was forever barred from prosecuting petitioner for failure to register as a sex offender based on his 1995 Placer County Superior Court conviction. The undersigned notes that the most recent felony complaint filed against petitioner in Sacramento County Superior Court Case No. 07F09282 alleges that he violated state law in 2006 and 2007 by failing to register as a sex offender in violation of California Penal Code § 290. Nowhere does that complaint mention the state's charges brought against petitioner in 1998 that were dismissed by the Ninth Circuit in 2003. The charges brought against petitioner with respect to his failure to register in 2006 and 2007 as required by his 1995 conviction in the Placer County Superior Court are new charges, distinct from the 1998 dismissed

charges. Accordingly, petitioner's claims set forth in the pending petition are without any factual basis. [Citation.]

" 'Petitioner filed a similar application for a writ of habeas corpus in this court in Case No. CIV S–08–0175 LEW JFM. Therein, petitioner also claimed that he should not be required to register as a sex offender in light of the Ninth Circuit's 2003 *McNeely* decision. Petitioner also argued that the state prosecution against him in Sacramento County Superior Court Case No. 07F09282 violated the Double Jeopardy Clause. On March 7, 2008, the assigned magistrate judge issued findings and recommendations, recommending that the action be dismissed. The magistrate judge extensively explained that, in *McNeely*, the Ninth Circuit had addressed the charges brought against petitioner in Sacramento County in 1998. In contrast, in Sacramento County Superior Court Case No. 07F09282, petitioner was being charged with failing to register as a sex offender in 2006 and 2007 as required by his 1995 conviction in the Placer County Superior Court. The magistrate judge rejected petitioner's double jeopardy claim, observing that the charges of failing to register in 2006 and 2007 were new and distinct offenses from both his underlying 1995 conviction and the dismissed 1998 charges. On April 4, 2008, the assigned district judge adopted those findings and recommendations in full and entered judgment. On November 3, 2008, the Ninth Circuit affirmed the decision of the district court dismissing that petition.

" 'Petitioner raised a similar claim in this court in case No. CIV S–09–2520 WBS GGH P. That case was ultimately dismissed on petitioner's request for a voluntary dismissal.

" 'Petitioner has never demonstrated that his 1995 conviction for continuous sexual abuse of a child has been invalidated, by the Ninth Circuit in *McNeely*, or at any other time. The charges brought against petitioner in the instant case do not mention the state's charges brought against petitioner in 1998 that were dismissed by the Ninth Circuit in 2003 in *McNeely*. (Clerk's Transcript on Appeal (CT) at 120–21.) Thus, as petitioner has been advised on several occasions, the decision in *McNeely* has no bearing on petitioner's current conviction for failing to register as a sex offender, which is based

on his 1995 conviction and not on his 1998 arrest. Further, each time petitioner fails to register as a sex offender based on that 1995 conviction, he may be charged in a new criminal case without violating the Double Jeopardy Clause. As petitioner was advised in Case No. CIV S–08–0175 LEW JFM, 'a convicted sex offender's duty to register is a continuing one and thus the failure to comply constitutes a continuous crime.' Case No. CIV S08–0175 LEW JFM, at 4. In short, until petitioner's 1995 conviction is invalidated, petitioner must continue to register as a sex offender or face new criminal charges. Petitioner's claim that the Ninth Circuit decision in *McNeely v. Blanas* invalidates his current conviction for failing to register as a sex offender, and his claim that his conviction for failing to register in 2007 and 2008 violates the Double Jeopardy Clause, each lack a legal and factual basis. Accordingly, they must be denied.' "

As the foregoing makes clear, federal courts have repeatedly considered and rejected petitioner's argument that the dismissal of the 1998 charges invalidated the 1995 conviction. Those decisions must be given collateral estoppel effect. " 'Collateral estoppel is an equitable concept based on fundamental principles of fairness.' [Citation.] 'Issue preclusion prevents "relitigation of issues argued and decided in prior proceedings." [Citation.] The threshold requirements for issue preclusion are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding. [Citation].' [Citation]." (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 398–399.) All of the elements of the doctrine are met in this case.

Our conclusion makes it unnecessary to consider respondent's other arguments that the order appealed from should be upheld. And, because appellant has not shown how he could amend the petition to show he is not required to register as a sex offender, he has not carried his burden of showing the trial court abused its discretion in sustaining

the demurrer without leave to amend. (See *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)[3]

## IV. DISPOSITION

The judgment is affirmed. Costs to respondent.

[3] On August 23 2018 and on September 10, 2018, appellant filed motions for sanctions against respondent's counsel, arguing that he has engaged in bad faith tactics that are frivolous or designed solely for harassment and delay. We deny the motions.

NEEDHAM, J.

We concur.

JONES, P.J.

BURNS, J.

(A152898)